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No. 85-1071

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CAROLE A. RAYBURN, *Petitioner,*

v.

GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, *et al.*, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondents believe that the Questions Presented in the Petition for a Writ of Certiorari do not adequately state the issues of this case. Respondents submit that the following questions more accurately state the issues before this Court.

I. Was the court of appeals correct in holding that although Title VII of the Civil Rights Act of 1964 applied to the employment decision in a case brought by a woman denied a ministerial position in a church, suit was barred by the Religion Clauses of the First Amendment because governmental scrutiny would infringe substantially on the Church's free exercise of religion and would constitute an impermissible government entanglement with church authority?

II. Is there a conflict among the circuit courts on the issues presented in this Petition?

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COUNTERSTATEMENT OF THE CASE

This case involves a dispute between the Seventh-day Adventist Church and Carole A. Rayburn, one if its female members, over the Church's failure to hire her for a ministerial position.

Rayburn applied to the Potomac Conference for an associate in pastoral care internship. She also applied for a vacancy on the pastoral staff of Sligo Church. Both the Sligo vacancy and the internship position were awarded to another woman. Rayburn filed a complaint with the Equal Employment Opportunity Commission alleging discrimi-

nation on the basis of her sex and racial association.[1] After receiving a right-to-sue letter, she filed the present action against Respondents.

The issue before the district court was whether a woman denied a pastoral position in the Seventh-day Adventist Church may charge that church with sexual and racial discrimination under Title VII of the Civil Rights Act. In granting Respondents' motions for summary judgment, Judge Black of the district court concluded that: "[T]hese positions are ministerial in nature. . . .[T]he tasks are similar to those performed by ordained ministers. . . . [T]he associate positions perform functions which go to the root of the Church's religious mission." Petitioner's Appendix (Pet. App.) 52-A, 53-A. He ruled that a Title VII suit was barred in this instance by the Religion Clauses of the First Amendment. Contending that the selection of an associate in pastoral care is not exempt from Title VII scrutiny, Rayburn appealed to the Fourth Circuit Court of Appeals.

In affirming the lower court's decision, Judge Wilkinson, speaking for a unanimous appellate court, found the evidence "simply overwhelming" that the positions sought by Rayburn were important to the spiritual and pastoral mission of the Church. Pet. App. 22-A. The court, concluding that the positions which Rayburn sought "entailed teaching baptismal and Bible classes, pastoring the singles group, occasional preaching at Sligo

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[1] While the Church does not condone racial or sexual discrimination, it does not presently ordain women as ministers. While Rayburn was not hired, the vacancy that she applied for was awarded to another woman. Further, a significant portion of the Church's membership is black. There are many black clergymen and leaders in the Church as well. The Church teaches that racial and sexual discrimination is abhorrent.

and other churches, and other evangelical, liturgical, and counseling responsibilities," observed that:

> The associate in pastoral care at Sligo Church is, according to undisputed evidence, pastoral advisor to the Sabbath School that introduces children to the life of the church. She also leads small congregational groups in Bible study. As counselor and as pastor to the singles group, the associate in pastoral care is once again a liaison between the church as an institution and those whom it would touch with its message.

Rayburn v. *General Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1168.

While acknowledging that Title VII applied to the employment decision in this case, the court of appeals held that suit was barred by the Religion Clauses of the First Amendment because governmental scrutiny "would infringe substantially on the Church's free exercise of religion and would constitute an impermissible government entanglement with Church authority. "It determined that any attempt to restrict the Church's choice of its spiritual leaders would constitute a burden on the Church's free exercise rights. Pet. App. 2-A, 17-A.

SUMMARY OF ARGUMENT

(1) The selection of a person to stand in the pulpit of a church is a decision absolutely protected by the Religion Clauses of the First Amendment.

(2) The Fourth Circuit decision followed applicable law and does not conflict with the decision of any other federal court of appeals; nor does the ruling decide a federal question in conflict with a state court of last resort.

ARGUMENT

Petitioner asserts that the decision of the court of appeals involves a frequently recurring issue, is in conflict with the decisions of other courts, and can only be resolved by this court. Pet. 19. While the specific issue raised by this case, the constitutionality of Title VII as it relates to the Seventh-day Adventist Church's selection of its ministers, has never been tested in this Court, the broad principal involved, the protection of the relationship between a church and its clergymen against governmental interference on First Amendment grounds, has been considered by this Court many times.

Where, as here, the issue was resolved by the district court and the court of appeals in a manner consistent with the applicable decisions of this Court and other circuit courts of appeals that have addressed this issue, there is no need for this Court to grant Certiorari.

I. The Religion Clauses Of The First Amendment Protect Churches From Governmental Interference With The Church's Central Spiritual Functions

Despite Petitioner's attempt to expand the holding of the court of appeals, the issue involved in this case is a narrow one: whether the provisions of Title VII may be applied to the employment relationship between a church and its ministers without violating the Religion Clauses of the First Amendment. Petitioner would ignore this issue, rather suggesting that the "critical question" to be resolved by this Court is whether or not First Amendment protections are available to a church absent a showing of some doctrinal basis for its alleged acts of discrimination.

Permitting the government to scrutinize the selection of clergymen would violate the Religion Clauses of the

First Amendment in two respects. First, it would interfere with the Church's right to select its own clergy in violation of the Free Exercise Clause. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). Secondly, it would lead to "excessive government entanglement" with religious institutions which is forbidden by the Establishment Clause. *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971). Since the purpose of a Church is fundamentally spiritual, evaluation of its employment practices in the selection of persons to fill ministerial positions would entail obvious constitutional problems under both of the Religion Clauses.

A. Free Exercise Clause

The Seventh-day Adventist Church has a substantial interest in autonomy in the selection of its clergy and hence must not be subject to those legal restraints applicable to secular or commercial institutions. *Cf. Regents of the University of Michigan* v. *Ewing*, 54 U.S.L.W. 4055, at 4058, N.12 (1985). *See also* Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L.Rev. 1373, 1389 (1981). The importance of the role of associate in pastoral care in the church-minister relationship was properly emphasized by the court of appeals:

> The role of associate in pastoral care is so significant in the expression and realization of Seventh-day Adventists beliefs that state intervention in the appointment process would excessively inhibit religious liberty. The associate in pastoral care at Sligo Church is according to undisputed evidence, pastoral advisor to the Sabbath School that introduces children to the life of the church. She also leads small congregational groups in Bible study. As coun-

> selor and as pastor to the singles group, the associate in pastoral care is once again a liaison between the church as an institution and those whom it would touch with its message. Such counseling requires sensitivity both to the human problems of the congregation and to the church's message of comfort in the face of those problems. Never are people more in need of spiritual leadership than when they turn to a pastor for help in dealing with their most difficult moments. Finally, the selection of the associate in pastoral care to stand on the platform during services, to lead out the congregation during the church's solemn rites, and to preach occasionally from the pulpit, places the imprimatur of the church upon that person as a worthy spiritual leader to whom members may look for consultation, example and guidance in their own lives and in the life of the congregation as a corporate body. Pet. App. 18-A, 20-A.

For the government to interfere with this selection process or decision constitutes a violation of the Church's right to the free exercise of this core religious act.

An inquiry under the Free Exercise Clause requires the following analysis: (1) Is the practice questioned religious in nature? *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-16 (1972). (2) Does the challenged action interfere with the religious practice? *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 105 S.Ct. 1953 (1985). (3) Is the government's policy justified by a compelling interest which cannot otherwise be indicated? *Wisconsin* v. *Yoder, supra*. As the facts of this case show, the selection of a minister is clearly a religious function; there is no compelling government interest which cannot otherwise be served by exempting such positions from Title VII.

The selection of a minister goes to the heart of a Church's free exercise rights under the First Amend-

ment. The courts have scrupulously followed this Court's recognition of the constitutional mandate to avoid involvement in church-minister relationships. *Gonzalez* v. *Archbishop of Manila*, 280 U.S. 1 (1929); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S 94 (1952).

In *Kedroff* v. *St. Nicholas Cathedral*, *supra*, this Court considered a case involving a state law which transferred administrative control of the Russian Orthodox churches in North America from the Patriarch of Moscow to authorities selected by a convention of Russian Orthodox churches in North American. This resulted in appointees of the Patriarch of Moscow being denied the use and occupancy of St. Nicholas Cathedral in New York City.

Holding the state law to be an unconstitutional interference with the free exercise of religion, this Court stated: "legislation that regulates church administration, the operation of the churches, the appointment of clergy . . prohibits the free exercise of religion," *Id.* at 107. There must exist, the Court observed, "a spirit of freedom for religious organizations, and independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine," *Id.* at 116.

In *Gonzalez* v. *Archbishop of Manila*, *supra*, the Petitioner attempted to challenge a refusal by the Archbishop of Manila to appoint him to a chaplaincy. This refusal was upheld by this Court which held that it is the function of church authorities to determine what the essential qualifications of a chaplain are and whether a candidate possesses them and that the decisions of the proper church tribunal on matters purely ecclesiastical, although

affecting civil rights, are to be accepted in litigation before the secular courts as conclusive.

In *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, *supra*, this Court found that a state court's "detailed review" of evidence challenging the removal and defrockment of a bishop by a hierarchal church whose religious bodies had sole discretion and authority to make such ecclesiastical decisions was impermissible under the First and Fourteenth Amendments. The state court's error was compounded by evaluating the evidence, delving into various church constitutional provisions and sanctioning circumvention of tribunals set up to resolve internal church disputes. In summary, the state court unconstitutionally undertook resolution of quintessentially religious controversies committed by the First Amendment exclusively to the highest ecclesiastical tribunals of the hierarchial church.

If the decision of the church's governing body must be accepted as final and binding on questions of actual participation in the ministry of the church; if courts may not decide who ought to be a member of a church, or whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church, then certainly the decision as to whether someone has been "justly or unjustly, regularly or irregularly" excluded from participation in a calling which is decidedly sacramental and sacerodotal is also beyond the purview of the courts and Congress.

In its decision, the court of appeals gave careful consideration to the applicable precedents of this Court. It recognized that these cases stand for the proposition that matters of church government and administration, including ecclesiastical rules, customs, laws and practices, as

well as those of faith and doctrine, are beyond civil authorities and that these are "matters at the very core of religion" and thus protected against governmental infringement by the First Amendment. Legislation which attempts to regulate matters of church government or the relationship between the church and its ministers is an unconstitutional intrusion of governmental power into "the forbidden area of religious freedom." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 at 107-08, 119.

At least three appellate court decisions have had occasion to consider the appropriateness of governmental intervention into employment decisions affecting sensitive positions within religious organizations. In *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972), a woman who had been an officer-minister with the Salvation Army charged that she had been paid less and provided with fewer fringe benefits than similarly situated males, and further, that she had been discharged in retaliation for complaints made to superiors and the Equal Employment Opportunity Commission. She initiated legal proceedings against her former employer under Title VII seeking reinstatement as an officer-minister. The Salvation Army moved to dismiss, contending that application of Title VII to a church-minister employment relationship would violate the Free Exercise Clause of the First Amendment.

The Fifth Circuit's opinion made the following observation:

> The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purposes. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a

> minister is a matter of church administration and government, so are the functions which accompany such a selection.

McClure v. *Salvation Army*, 460 F.2d at 559.

The court was concerned that the application of Title VII to the church-minister relationship would indeed violate the free exercise rights of this religious organization. It concluded that Congress, in enacting Title VII, did *not* intend to regulate the employment relationship between a church and its ministers. In this construction of Title VII, the court anticipated the Supreme Court's own conclusion in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

In *Catholic Bishop of Chicago* v. *NLRB*, 559 F.2d 1112 (1977), *aff'd on other grounds*, 440 U.S. 490 (1979), the Seventh Circuit expressed grave concern with the National Labor Relations Board exercising jurisdiction over Catholic parochial school teachers. Relying upon the "Religion Clauses" the court ruled that the Board did *not* have jurisdiction over such teachers:

> A church which chooses to educate its own young people in schools which it is required essentially to finance without governmental aid should because of the essentially religious permeation of its curriculum be equally freed of the obviously inhibiting effect and impact of the restrictions of the National Labor Relations Act in conducting the teaching program of those schools.

Catholic Bishop of Chicago v. *NLRB*, 559 F.2d 1112 at 1130. If the Catholic Church is protected from governmental interference in matters pertaining to its school teachers, certainly other churches, including the Seventh-day Adventist Church must be entitled to complete

freedom in the selection of those persons who will direct the spiritual lives of its congregation.

Recently, the Sixth Circuit has had occasion to address the application of the Ohio Civil Rights Act to the position of a church school teacher. In *Dayton Christian Schools* v. *Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985), *prob. juris. noted*, 54 U.S.L.W. 3323 (Nov. 12, 1985), found that the parochial school involved had "a dominant religious purpose which permeates both the administrative and substantive aspects of the school." *Id.* at 936.

The court ruled that the Ohio Civil Rights Commission—exercising powers not unlike the Equal Employment Opportunity Commission—did *not* have jurisdiction over a discharged teacher's employment discrimination charge. The school, owned and operated by a religious organization, had indicated it would not rehire the teacher because she was pregnant and school policy required such persons to remain at home with their preschool children. The teacher was subsequently discharged because she had filed a charge with the Commission thus failing to follow the Biblical chain of command by taking the school to law.

The Court found the exercise of jurisdiction by the Commission over church school teachers to be "extremely burdensome on appellants' exercise of religion." It found coercive state action and observed:

> [W]hen the state penalizes particular hiring practices with respect to an individual employed to provide religious instruction and act as a religious role model when the employment is governed by religious principles, a burden on religion exists.

Dayton Christian Schools, 766 F.2d at 950.

Thus, the Supreme Court and various appellate courts have recognized the grave free exercise problems which arise whenever efforts are made to interfere with employment practices of religious organizations. The Seventh-day Adventist Church maintains that of all positions in a religious organization, the highest in a spiritual sense and most certainly protected by the Free Exercise Clause is that of the minister. There exists no valid reason or interest for the church's decisions pertaining to this position to be questioned under civil law.

B. Establishment Clause

The intrusion of the federal government and the civil courts into the selection of church leaders also raises legitimate concerns under the Establishment Clause of the First Amendment. The court of appeals correctly reasoned that if the dangers of entanglement are acknowledged by this Court to be severe with respect to church related organizations, such as parochial schools, *Aguilar* v. *Felton*, 105 S.Ct. 3232 (1985), they are all the more dangerous with respect to churches themselves. While schools serve both secular and sectarian functions, the purpose of a church is fundamentally spiritual and interaction between churches and the state is precisely what the Establishment Clause protects against.

The purpose of a church is spiritual. Thus, evaluation of its employment practices entail obvious constitutional problems. Application of Title VII to employment decisions such as the one in this case, would result in an impermissibly close relationship between church and state on both substantive and procedural levels.

Focusing on the substantive level, the court of appeals stated:

> [T]he unrefuted evidence from appellee Potomac Conference emphasized the importance of "spirituality" as an attribute of an associate in pastoral care and stated that in making an appointment, "The guidance of the Holy Spirit is always sought so that the one chosen can be God's appointed, as well as the one who has the support of his/her fellow churchmembers." *It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of "God's appointed."* [Emphasis added.]

Pet. App. 29-A, 30-A.

In addition, the court recognized that the goals of the Church in selecting its ministers and the governmental agency in performing its statutory obligation may not be the same. The EEOC might not share the Church's values. There exists a danger that the choices of clergy which conform to public agency preferences might be favored over those which were neutral. The court recognized that at times the preferences of a church might be impermissible in the secular sphere. Noting that the temptation for state intrusion becomes apparent where goals differ, the court stated:

> But "[e]ven if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal." Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Columbia L.Rev. 1373, 1399 (1981). Where the values of state and church clash or where there is a differing emphasis among priorities or as to means in an employment decision of a theological nature, the church is entitled to pursue its own path without concession to the views of a federal agency or commission. Bureaucratic suggestion in employment

> decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority and compromise the premise "that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere." *McCollum* v. *Board of Education*, 333 U.S. 203, 212 (1948).

Pet. App. 31-A, 32-A.

On the procedural level, the court recognized that the church and state might be pitted against each other in protracted legal battles resulting in entanglement disregarding this Court's warning in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490. Pervasive monitoring by public authorities infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. The court stated:

> A Title VII action is potentially a lengthy proceeding, involving state agencies and commission, the EEOC, the federal trial courts and courts of appeal. Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers. The remedies that a district court may impose, 42 U.S.C. § 2000e-5(g) (1982), may be far-reaching in their impact upon religious organizations. Even after entry of judgment, questions of compliance may result in continued court surveillance of the church's policies and decisions.

Pet. App. 33-A.

As this Court observed in *NLRB* v. *Catholic Bishop of Chicago*, *supra*, "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religious Clauses, but also the very

process of inquiry leading to findings and conclusions," 440 U.S. at 502. The court of appeals expressed the same concerns here: "There is the danger that churches, wary of EEOC judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal doctrinal assessments of who would best serve the pastoral needs of their members."

Pet. App. 34-A.

To subject the selection of ministers to scrutiny under Title VII would give rise to "excessive government entanglement" with religious institutions in violation of the Establishment Clause of the First Amendment, *Lemon* v. *Kurtzman*, 403 U.S. at 613. Under *Lemon*, entanglement is measured by the "character and purposes of the institutions that are benefited, the nature of the aid . . . and the resulting relationship between the government and the religious authority," 403 U.S. at 615. Any evaluation under this criteria requires a church to be exempt in the selection of its ministers from the type of governmental scrutiny which would result under Title VII.

The Church does not claim to be above the law. But in the selection of clergy, it is improper, impractical and unconstitutional to apply Title VII to this process. Petitioner argues that Seventh-day Adventist doctrine is consistent with the objectives of Title VII with respect to discrimination based on sex, race and association and would therefore invoke the aid of the federal courts to enforce her interpretation of Seventh-day Adventist doctrine in this regard. It is important to note that Title VII covers complex matters of discrimination including failure or refusal to hire, discharge, compensation and the

"terms, conditions and privileges of employment." Can the federal government, through the EEOC or otherwise, ever dictate the terms of a minister's calling? Is the EEOC going to be permitted to investigate an associate in pastoral care's hours, place of assignment, type of activity assigned, or the number of hardships she must undergo in order to fulfill her religious mission? If unrestrained by the First Amendment, Title VII would reach so deeply into the intimate relationship of the Church and its ministers that it would seriously disrupt and interfere with the most basic function of a minister: spreading of the gospel. If the Church's doctrine requires that males and females of all races be treated equally, the Seventh-day Adventist Church is certainly to be commended. If its doctrine in these respects seems to be consistent with the objectives of Title VII of the Civil Rights Act, all the better. However, the Establishment Clause prohibits the courts or Congress through the EEOC or otherwise, from venturing into this constitutionally protected area for the purpose of attempting to determining whether the Seventh-day Adventist Church or any other church is, in fact, adhering to its doctrines, tenets or practices with respect to its clergy.

II. This Is Not A Frequently Recurring Issue Nor Is It In Conflict With The Decisions Of Other Courts

This decision is one of first impression insofar as it declares Title VII unconstitutional when applied to the church-minister employment relation. The principle of exempting ministerial positions from the Act has, however, been embraced in a line of Fifth Circuit cases beginning with *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). *See also EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905

(1982); *Cf. Simpson* v. *Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974); and *Dayton Christian Schools, Inc.* v. *Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985), *review granted*, 54 U.S.L.W. 3323 (Nov. 12, 1985).

The decision before this Court is not in conflict with any other federal appellate court decision known to the Respondents. The cases referred to in Rayburn's Petition are clearly distinguishable on their facts. For example, *EEOC* v. *Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982), applied Title VII to an editorial secretary; *Whitney* v. *Greater New York Corporation of Seventh-day Adventists*, 401 F.Supp. 1363 (S.D. NY 1975), applied Title VII to a clerk typist position; *Dolter* v. *Wahlert High School*, 483 F.Supp. 266 (N.D. Iowa 1980), applied Title VII to a church school teacher who was discharged because she was pregnant. None of the cases involves the application of Title VII to the church-minister relationship. Thus, Petitioner's reliance on these cases is misplaced. Recognizing this distinction, the Fourth Circuit expressly refrained from adopting or rejecting the specific rulings of those cases involving the employment relationship between a church or church-related organization and its non-ministerial employees which the Petitioner has cited.

The Petitioner does not refer to, nor are Respondents familiar with any state court decisions confronting this issue.

CONCLUSION

Who is to stand in the pulpit represents a uniquely ecclesiastical decision over which neither the government nor the civil courts may exercise any power. For the reasons stated herein, the decision of the Court of Appeals for the Fourth Circuit finding Title VII unconstitutional as applied to the selection of clergy by the Seventh-day Adventist Church is clearly correct and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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